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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

WONG KAY SUEY, WONG POO SING, AND EMILY WONG

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, reversing the judgments of the United States District Court for the District of Columbia which had denied preliminary injunctions sought in connection with actions under Section 503 of the Nationality Act of 1940 on the ground that the court was without jurisdiction of the actions.

OPINIONS BELOW

The consolidated opinion of the Court of Appeals (Appendix, *infra*, pp. 19–24) is not yet reported. The findings of fact and conclusions of

law of the District Court in each case appear in the record (R. 15–19).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1955 (Appendix, *infra*, pp. 25–26). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Respondents, who sought admission to the United States as citizens, were initially excluded in August 1952, and were released on bond pending exhaustion of their administrative remedies. In February 1954, each filed a complaint under Section 503 of the Nationality Act of 1940, seeking a declaration of citizenship. The question presented is whether that statute is applicable to these respondents, or whether, under Section 360 (a) of the Immigration and Nationality Act of 1952, respondents may obtain judicial review of the issue of citizenship only in habeas corpus proceedings.

STATUTES INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903, provided:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official

[1] There is a consolidated record for all three cases.

> thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is in the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *[2]

Section 360 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273, 8 U. S. C. 1503, provides:

> If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding un-

[2] Repealed, effective December 24, 1952, by Section 403 (a) (42) of the Immigration and Nationality Act of 1952.

> der the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

Section 405 (a) of the Immigration and Nationality Act of 1952, 66 Stat. at 280, 8 U. S. C. 1101, note, provides:

> Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [sic], conditions, rights, acts, things, liabilities, obiligations, or matters the statutes or parts of statutes repealed by this Act are, unless

otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

STATEMENT

In February 1954, each of the respondents commenced an action in the District Court for the District of Columbia under Section 503 of the Nationality Act of 1940, *supra,* pp. 2–3, seeking a declaration that each was a citizen of the United States. The complaints alleged that the particular respondent was a citizen of the United States, born in China of an American citizen father, that each had arrived at San Francisco in 1952 (August and October), and that each had been denied admission by the San Francisco office of the Immigration and Naturalization Service. Each complaint further alleged that thereafter the respondent "was released under bond, and then

proceeded to exhaust all administrative rights and remedies available to him" (R. 7–11).

The respondents sought a preliminary injunction restraining petitioner from deporting them under the orders of exclusion (R. 14–15). After a hearing on the motion for preliminary injunction, the District Court entered findings of fact and conclusions of law—pointing out that the issue of citizenship arose in an exclusion proceeding—and denied the motion for injunction for lack of jurisdiction. The court held that Section 503 of the Nationality Act of 1940 had been repealed by the Immigration and Nationality Act of 1952; *supra*, pp. 3–4; that under Section 360 (a) of the 1952 Act no action for a declaration of citizenship can be maintained where the issue of citizenship is involved in an exclusion proceeding; and that Section 405 (a) of the 1952 Act, *supra*, p. 2, "does not save the remedy which might have been available to plaintiff under Section 503 of the Nationality Act of 1940" (R. 15–19).

The Court of Appeals reversed, holding that the savings clause of the 1952 Act is broad enough to cover respondent's "rights, under the 1940 Act, to sue for declaratory judgments" (Appendix, *infra*, pp. 19–24).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has held that a person initially denied admission by the immigration authorities before the effective date of the Immigration

and Nationality Act of 1952 has preserved to him the remedy of a declaratory judgment under Section 503 of the Nationality Act of 1940, despite the repeal of that statute by the 1952 Act, and despite the fact that Section 360 (a) of the 1952 Act provides that where issues of citizenship are involved in exclusion proceedings a declaratory judgment action shall not lie. In so holding, the court below has decided a matter of considerable importance in the administration of the nationality laws, in a manner which is contrary to the legislative purpose, and in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Nevarez* v. *Brownell,* 218 F. 2d 575.

1. In the *Nevarez* case, the Fifth Circuit had before it a person, born in the United States, who had left the country, and on his return in 1948 had been excluded on the ground that he had expatriated himself by leaving to avoid military service. An action for declaratory judgment, brought before 1952, had abated in 1952 for failure to substitute the new Attorney General. Thereafter, in 1953, the claimant brought a new action for a declaratory judgment under Section 503 of the Nationality Act of 1940, asserting that the timely filing of the first action gave him a right under the savings clause of the 1952 Act to continue the litigation. The Court of

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Appeals sustained a dismissal of the suit, declaring that under the express provisions of Section 360 of the 1952 Act (8 U. S. C. 1503, *supra*, pp. 3–4) the claimant could not bring an action for a declaratory judgment since "the question of appellant's nationality or citizenship was raised when he first sought admission to this country in 1948"; that his remedy, if any, was through habeas corpus. 218 F. 2d at pp. 577–578.[3] Although there had clearly been a right to bring a declaratory judgment action before the 1952 Act became effective, the Fifth Circuit held that such right did not survive.

In these cases, the court below has held that the right did survive even though the right to bring an action under former Section 503, before enactment of the 1952 Act, was not clear from the face of the complaints. It appears from the complaints that petitioners had merely been initially excluded in August and October 1952. Before there could be a final denial of their right to admission, their cases had to be heard by a Board of Special Inquiry, subject to review by the Board of Immigration Appeals. The complaints allege merely that after release on bond they

[3] There are a number of district court decisions in accord with *Nevarez*. *Matsuo* v. *Dulles*, 133 F. Supp. 711 (S. D. Cal.); *Correia* v. *Dulles*, 129 F. Supp. 533 (D. R. I.); *Fusae Yamamoto* v. *Dulles*, 16 F. R. D. 195 (D. Hawaii); *D'Argento* v. *Dulles*, 113 F. Supp. 933 (D. D. C.); *Ng Gwong Dung* v. *Brownell*, 112 F. Supp. 673 (S. D. N. Y.); *Avina* v. *Brownell*, 112 F. Supp. 15 (S. D. Tex.).

proceeded to exhaust their administrative remedies, without giving the dates on which the remedies were exhausted. Respondents did not and could not state that those administrative remedies had been exhausted before December 24, 1952, when the 1952 Act became effective.[4] Thus, although from the complaints it did not appear that the actual exclusion of petitioners had been concluded before the 1952 Act became effective, the court below held, contrary to *Nevarez,* that a "right" to bring an action under former Section 503 survived.

2. The issue to which this conflict of circuits relates is an important one which should be settled by this Court. The State Department has informed us that during the five years from 1948 to 1952, 37,518 certificates of loss of nationality were approved.[5] Under the doctrine enunciated by the court below in this case, the door is now open to all those citizenship claimants (not resident in this country) who have not previously done so to institute suits for declaratory judgment under former Section 503. In addition, the federal courts, particularly of California, had,

[4] The decisions of the Board of Immigration Appeals were dated May 20 and May 26, 1953, with rehearing denied on October 27, 1953.

[5] Section 501 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 901, provided as follows:

"Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign

under former Section 503, received a very large number of actions by persons claiming United States nationality as the foreign born children of American parents, and seeking to come to the United States. See *Ly Shew* v. *Acheson,* 110 F. Supp. 50 (N. D. Cal.), reversed, *Ly Shew* v. *Dulles,* 219 F. 2d 413 (C. A. 9). Under the decision below, all such persons whose requests for travel documents as American citizens were denied before 1952, on the ground that citizenship was not established, would still be able to bring actions under former Section 503. While the exact number of such cases is not known, it is thought to be considerable. Thus, the issue as to the proper procedure for determining the nationality of persons outside the United States who seek admission to the United States as citizens is one of continuing importance, not only to the administrative authorities, but to the courts.

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state has lost his American nationality under any provision of chapter IV of this Act ["Loss of Nationality"], he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations to be prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Department of Justice, for its information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates."

Section 358 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1501) contains a comparable provision.

3. We submit, further, that the decision below is incorrect; that the language of both the savings clause in Section 405 (a) and of Section 360 (a) of the 1952 Act shows that Section 360 (a) was to govern any suit to obtain a declaration of citizenship begun after the effective date of the 1952 Act; and that pertinent principles of statutory construction and the legislative history of the 1952 Act also support this view.

(a). Section 405 (a) provides in relevant part that:

> Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; * * *.

Even assuming that respondents had been completely excluded by December 24, 1952, when the 1952 Act took effect, there is nothing in the wording of the savings clause which brings a declaratory judgment action not yet instituted [6]

[6] Of course, declaratory judgment actions actually begun before December 24, 1952, do fall under the savings clause. For this reason, the decisions of the Ninth Circuit in *Fujii* v. *Dulles*, 224 F. 2d 906, and *Suda* v. *Dulles*, 224 F. 2d 908, are not in point on the issue here involved. There, the actions had been commenced before the effective date of the 1952 Act, the issue being whether there had been a sufficient denial of a right of citizenship to warrant the institution of such action

within the purview of that section. The court below considered the "right" to bring a declaratory judgment action as a "right in process of acquisition" within the terms of the statute, but this seems clearly unsound. There is no "right" in any particular form of procedure. *Bruner* v. *United States,* 343 U. S. 112, 117; *Ex parte Collett,* 337 U. S. 55, 71; *Hallowell* v. *Commons,* 239 U. S. 506, 508. The "rights" which petitioners were asserting at all times, in the exclusion proceeding and in the declaratory judgment actions, were rights as American citizens which, if they existed at all, petitioners had from birth. A "right in the process of acquisition" within the terms of the savings clause, by its very wording, relates to a substantive right to be secured, such as the right to be naturalized which was involved in *United States* v. *Menasche,* 348 U. S. 528. No such "right" is involved in the question of whether there survives a particular mode of establishing substantive rights allegedly in existence for many years.

(b). Moreover, the savings clause itself provides that it shall apply "unless otherwise specifically provided." See *Shomberg* v. *United States,* 348 U. S. 540. Section 360 (a) is a section

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before December 24, 1952. Since it appeared from the Government's records that there had in fact been such a denial, no review of the decisions was sought, although the Government does not acquiesce in all of the statements contained in the Ninth Circuit opinion.

otherwise specifically providing for retroactive effect; it states that a declaratory judgment action shall not lie if the issue of citizenship "(1) *arose* [in an] exclusion proceeding under the provisions *of this or any other act,* or (2) is in issue *in any such* exclusion proceeding." [Emphasis added.] The use of the past tense "arose" in a statute which otherwise uses the present tense is itself a strong indication that Congress intended past exclusion proceedings to be governed by the present procedure. And this conclusion is fortified by the phrase "of this or any other act." The 1952 Act, which is a comprehensive codification of the laws on immigration and nationality, is the statute under which all exclusions after December 24, 1952, would be enforced. "Any other act," referred to in Section 360 (a), must relate to past exclusions under past acts.

The court below recognized that the language of Section 360 (a) "might perhaps seem to bring the case within the words 'otherwise specifically provided'" to take that section out of the general savings clause (Appendix, *infra,* p. 22), but thought the language did not have the same degree of specificity as other sections which have been construed to render the savings clause inoperative. In the 1952 Act, however, Congress did not use any one set formula to show that the savings clause was not to apply. The language of Section 241 (d), referred to below as a specific

section,[7] is quite different from the language of Section 313 (a), also thought by the court below to have the degree of specificity rendering the general savings clause inapplicable.[8] For the reasons set forth immediately above, we think that the language of Section 360 (a), although employing a different set of words, clearly conveys the idea that the procedure in Section 360 (a) is to apply to a past exclusion which "arose" under an act "other" than the 1952 Act, *i. e.* under prior acts. Particularly is this true since, as we have already pointed out, an uninstituted action would not fall within the normal meaning of the terms used in Section 405 (a), and also because a change in remedy is generally construed as being immediately applicable. See *Ex parte Collett,* 337 U. S. 55, 71; *Bruner* v. *United States,* 343 U. S. 112, 116–117.

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[7] Section 241 (d), 66 Stat. at 208, 8 U. S. C. 1251 (d), held to render the savings clause inapplicable to save a prior status of non-deportability (*Gagliano* v. *Nabers*, 222 F. 2d 958 (C. A. 5), certiorari denied, 350 U. S. 902; see also *Marcello* v. *Bonds*, 349 U. S. 302), reads in pertinent part that the "provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding * * * that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

[8] That section, 66 Stat. at 240, 8 U. S. C. 1424 (a), relating to naturalization, like the section construed in *Shomberg* v. *United States*, 348 U. S. 540, begins, "Notwithstanding the provisions of Section 405 (b)." It does not refer to the general savings clause in Section 405 (a).

(c). The legislative history suggests that Congress intended to cut off the right to bring a declaratory judgment under former Section 503 by persons not admitted to the United States when the 1952 Act went into effect. As noted above, pp. 9–10, one of the problems which had arisen under Section 503 had been the number of cases of persons, particularly Chinese, who, although they had never set foot in the United States, claimed to be children of American citizen parents. In the broad study of the working of the existing immigration and nationality laws represented by Senate Report 1515, 81st Cong., 2nd Sess., the following observation is made (p. 777):

> In spite of the definite restrictions on the use and application of section 503 to bona fide cases, the subcommittee finds that the section has been subject to broad interpretation, and that it has been used, in a considerable number of cases, to gain entry into the United States where no such right existed.

The hearings on the McCarran-Walter bill (which became the 1952 Act) indicate that the concern was with "the fraud and the derivative citizenship cases," and with the fact that aliens not entitled to admission were gaining physical entry into the United States and disappearing into the general population. Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82nd Cong., 1st Sess. on S. 716, H. R. 2379,

and H. R. 2816, p. 443; see also pp. 108–109. The enactment of present Section 360, instead of the alternative suggestion that the pattern of former Section 503 be continued,[9] thus represents a clear Congressional decision to curtail the scope of declaratory judgment review, particularly with reference to derivative citizenship claims.

It would be incongruous to impute to Congress an intention to continue the applicability of former Section 503 to actions not yet instituted by the very group whose abuse of such actions led to the change of procedure. And since Congress used no words showing a purpose to have the former remedy apply, but, on the contrary, employed phraseology which, as the court below itself recognized, can reasonably be read to mean that the procedure established by the new Section 360 (a) should be applicable to all exclusions, past or present, where judicial review had not been sought by December 24, 1952, the holding below that the remedy of former Section 503 survives the repeal of that provision is unsound.[10]

[9] The revisions of procedure originated in the Senate bill. The House bill continued the provisions of former Section 503. See S. Rep. 1137, 82nd Cong., 2d Sess., p. 50; H. Rep. 1365, 82nd Cong., 2d Sess., p. 87. The Senate formulation ultimately prevailed.

[10] In view of its holding that the right to bring an action under former Section 503 survived, the court below found it unnecessary to determine whether respondents are "within the United States" so as to be able to bring an action under present Section 360 (a) (Appendix, *infra*, p. 24). We think

CONCLUSION

The decision below is erroneous and is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Nevarez* v. *Brownell*, 218 F. 2d 575. The issue involved is of continuing importance to the courts and to the administrative agencies concerned with nationality and exclusion. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

JANUARY 1956.

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it is clear that, if the present statute applies to these respondents, they may seek judicial review only by habeas corpus. In the first place, an excluded person physically admitted to the United States on parole is, in legal contemplation, still in the status of one stopped at the border. *Kaplan* v. *Tod*, 267 U. S. 228; *Shaughnessy* v. *Mezei*, 345 U. S. 206, 213, 215; see Section 212 (d) (5) of the 1952 Act. In the second place, even if within the United States, respondents are limited to habeas corpus since the issue of citizenship arose and was involved in an exclusion proceeding.

APPENDIX

PAGE BLEED THRU

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12092

WONG KAY SUEY, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL, APPELLEES

No. 12093

WONG POO SING, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL, APPELLEES

No. 12094

EMILY WONG, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided October 13, 1955

Mr. Charles R. Richey for appellants.

Mr. Lewis Carroll, Assistant United States Attorney, with whom *Mr. Leo A. Rover,* United States Attorney, *Miss Catherine B. Kelly,* Assistant United States Attorney, and *Mr. Albert E. Reitzel,* Assistant General Counsel, Immigration

and Naturalization Service, were on the brief, for appellees.

Before EDGERTON, WILBUR K. MILLER, and FAHY, Circuit Judges.

EDGERTON, *Circuit Judge:* These are exclusion cases that have been consolidated. The plaintiffs arrived in the United States in August or October, 1952. They claimed and were denied admission as citizens of the United States. Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. (1946 ed.) § 903, provides that "if any person who claims a right or privilege as a national of the United States is denied such right or privilege * * * such person, regardless of whether he is within the United States or abroad, may institute an action * * * for a judgment declaring him to be a national of the United States * * *."

In 1954 the plaintiffs filed separate complaints for judgments declaring them to be citizens of the United States, and asked that the defendants be restrained from interfering with their rights as citizens. In each case the District Court denied a preliminary injunction on the ground that it was "without jurisdiction to hear plaintiff's complaint for declaratory judgment". These appeals followed.

In December, 1952, the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. § 1101 *et seq.*, had become effective. Section 403 (a) (42), 66 Stat. 280, repeals the Nationality Act of 1940. Section 360 (a) of the Act of 1952 provides in effect that if any person "who is within the United States" claims a right as a national of the United States, and the right is denied upon

the ground that he is not a national, he may institute an action for a declaratory judgment, "except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding." 66 Stat. 273, 8 U. S. C. § 1503 (a).

The question is whether the 1952 Act deprived the plaintiffs of their right under the 1940 Act to have the issue of their citizenship, which had arisen in exclusion proceedings, decided in actions for declaratory judgments. We think not.

The question turns upon the savings clause of the 1952 Act. That clause, § 405 (a), provides that "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect * * * any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *" 66 Stat. 280, 8 U. S. C., p. 734.

The general language in this savings clause is broad enough to cover the plaintiffs' rights, under the 1940 Act, to sue for declaratory judgments. It may be said that the only "rights" directly referred to in the savings clause are rights "in process of acquisition". But we think this phrase

was intended to have a broadening rather than a narrowing effect. Congress can hardly have intended to preserve *only* rights "in process of acquisition" and cut off rights fully acquired. Moreover, the savings clause is to be liberally interpreted. "The whole development of this general savings clause * * * manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress." *United States* v. *Menasche,* 348 U. S. 528, 535.

The general language in this savings clause operates "unless otherwise specifically provided" in the Act. This exception does not cover this case. Nowhere in the 1952 Act is it "specifically provided" that if the issue of citizenship has arisen in an exclusion proceeding, a right already accrued under the 1940 Act, to have the issue decided in an action for a declaratory judgment, shall be cut off.

Considered by itself, and apart from the fact that the savings clause is to be liberally interpreted, the reference in § 360 (a) of the Act to exclusion proceedings under "this or any other act" might perhaps seem to bring the case within the words "otherwise specifically provided". But specificity is a matter of degree. What may be relatively specific in one context may not be so in another. At several points in the 1952 Act, exceptions to the general principle of the savings clause are so specifically expressed as to make § 360 (a)

seem, by comparison, to fall far short of "specifically" providing an exception. For example, § 241 (d), 66 Stat. 208, 8 U. S. C. § 1251 (d), enacts that "the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated [as deportable] in subsection (a), notwithstanding * * * that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." Section 360 (a), on the other hand, merely refers in general terms to an exclusion proceeding under "this or any other Act" and does *not* add: "notwithstanding that the exclusion proceeding occurred prior to the enactment of this Act." Section 313 (a), 66 Stat. 240, 8 U. S. C. § 1242 (a), enacts that "Nothwithstanding the provisions of section 405 (b) [a savings clause regarding petitions for naturalization] no person shall hereafter be naturalized as a citizen of the United States—(1) who advocates or teaches * * * opposition to all organized governments * * *"; and § 318, 66 Stat. 244, 8 U. S. C. § 1429, provides that "Notwithstanding the provisions of section 405 (b) * * * no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest * * *." Section 360 (a), on the other hand, does *not* enact that no action for a declaratory judgment may be instituted "notwithstanding the provisions of § 405 (a) * * *." Section 360 (a) does not mention § 405 (a).

We take § 360 (a) to mean that no right to have the issue of citizenship determined in a suit for a declaratory judgment shall arise in the fu-

ture, if the issue of citizenship arose in connection with exclusion proceedings. In view of the savings clause, we do not take § 360 (a) to mean that an existing right to sue for a declaratory judgment shall be cut off.

Our view of the case makes it unnecessary to decide whether the plaintiffs are "within the United States" in the sense of which § 360 (a) uses that term. Unless they are, the section does not apply to them at all. Even if they are, it does not bar their present suits.

We think the District Court erred in holding that it lacked jurisdiction.

Reversed.

In the United States Court of Appeals for the District of Columbia Circuit

October Term, 1955

No. 12092

WONG KAY SUEY, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

No. 12093

WONG POO SING, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

No. 12094

EMILY WONG, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before EDGERTON, WILBUR K. MILLER and FAHY, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the orders of the said District Court appealed from in these cases be, and the same are hereby, reversed, and that these cases be, and they are hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated: October 13, 1955.

Per Circuit Judge EDGERTON.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 619

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, *Petitioner*

v.

WONG KAY SUEY, WONG POO SING, and EMILY WONG

Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

CHARLES R. RICHEY
1025 Connecticut Avenue, N.W.
Suite 210
Washington 6, D.C.
Attorney for Respondent

WILSON - EPES PRINTING CO - RE 7-6002 - WASHINGTON 1, D. C.

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In The

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No. 619

Herbert Brownell, Jr., Attorney General of the United States, *Petitioner*

v.

Wong Kay Suey, Wong Poo Sing, and Emily Wong

Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The *unanimous* opinion of the Court of Appeals reversing the judgment of the District Court is reported at 227 F. 2d 41. The District Court made findings of fact and conclusions of law which appear in the record (R. 15-19).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1955 and appears at pp. 25-26 of the Appendix to Petitioner's petition herein. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

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[1] There is a consolidated record for all three cases.

QUESTION PRESENTED

Whether a person who asserted a claim to American citizenship which was denied and who then began to exhaust his administrative remedies while the Nationality Act of 1940 was still in effect, could sue for a declaratory judgment under section 503 of the 1940 Act after the final administrative denial of his asserted rights to citizenship, when such final administrative decision was not rendered until after the effective date of the Immigation & Nationality Act of 1952, by virtue of the savings clause under section 405 (a) of the 1952 Act?

STATUTES INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U.S.C. (1946 ed.) 903, provided:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is in the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. • • •

Section 360 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273, 8 U.S.C. 1503, provides:

> If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States,

except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the District Court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

Section 405 (a) of the Immigration and Nationality Act of 1952, 66 Stat. at 280, 8 U.S.C. 1101, note, provides:

Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enact-

ment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

STATEMENT

Respondents claim American citizenship by derivation of the American citizenship of their fathers. They arrived in the United States in August and October of 1952, and the Immigration and Naturalization Service denied them admission on December 2 and 3, 1952. They then immediately proceeded to exhaust their administrative remedies (R. 7-11). Since December 1952, the respondents have been at liberty under bond and still are in the United States in the same status.

Following the exhaustion of the administrative rights and remedies available to respondents they instituted suits for a declaratory judgment under Section 503 of the Nationality Act of 1940. After the complaints were filed the respondents received orders to report for deportation. They then sought from the District Court preliminary injunctions restraining petitioner from deporting them. This was denied for lack of jurisdiction (R. 14-19).

In the instant case the Court of Appeals *unanimously* reversed the District Court, holding that a right existing on the effective date of the Immigration and Nationality Act of 1952 to sue for a declaratory judgment was not cut off by the 1952 Act by virtue of the savings clause in section 405 (a) of the 1952 Act.

The Court of Appeals flatly rejected the government contention, which had been followed by the District Court, that under 360 (a) of the 1952 Act no action for a declaratory judgment can be maintained after the effective date of the 1952 Act where the issue of citizenship arose in exclusion proceedings. The Court below interpreted section 360 (a) *prospectively* in the same manner that this Court had treated the whole 1952 Act a few months previously in *United States* v. *Menasche*, 348 U.S.

528, 75 S. Ct. 513. The following is what the Court below said:

> "We take section 360 (a) to mean that no right to have the issue of citizenship determined in a suit for a declaratory judgment *shall arise in the future*, if the issue of citizenship arose in exclusion proceedings. In view of the savings clause, we do not take section 360 (a) to mean that an existing right to sue for a declaratory judgment shall be cut off." 227 F. 2d 41, 43. (*emphasis added*)

REASONS FOR DENYING WRIT

I. The Decision Of The Court Below Follows The Principle Previously Laid Down By This Court In United States v. Menasche, supra:

The decision by the Court below is in complete accord with the principles and rules so clearly and exhaustively enunciated by this Court in the *Menasche* case, *supra*, and they both held that Congress intended the Immigration and Nationality Act of 1952 to apply *prospectively*. Further, both this Court in the Menasche, opinion, *supra*, and the Court below held that the savings clause in the 1952 Act was intended to be *liberally construed* so as to *preserve existing situations* and not take away or cut off rights acquired under prior law.

When this Court in *Menasche, supra*, referred to the "broad sweep of section 405 (a)" and indicated that it shall apply even to situations "unattended by any affirmative action" *unless* the 1952 Act "otherwise specifically provides" it gave obvious direction to the Court below in the instant case when it subsequently rendered its decision and immediately after quoting from *Menasche, supra*, said:

> "The general language in this savings clause operates 'unless otherwise specifically provided' in the Act. This exception does not cover this case. No-

> where in the 1952 Act is it 'specifically provided' that if the issue of citizenship has arisen in an exclusion proceeding, a right already accrued under the 1940 Act, to have the issue decided in an action for a declaratory judgment, shall be cut off." (227 F. 2d 41, 43)

In accord with the opinion of Mr. Justice Clark in *U. S.* v. *Menasche, supra,* and following the above quoted section of its own opinion the Court below proceeded to enumerate several situations, such as the deportation provisions of the Act,[2] where Congress with *specificity* said time and again "Notwithstanding the provisions of section 405 (a) or (b)" the new law shall apply. Since section 360 (a), 8 U.S.C.A. 1503,[3] did not specifically, in the aforesaid manner, refer to the savings clause in section 405 (a) the Court below was obviously correct in holding that the old law (1940 Act) applied to the instant case. To have held otherwise, would have attributed to Congress the adoption of a meaningless provision of law in the form of section 405 (a).

It should be noted that the decision below was rendered on October 13, 1955, and that it was decided *after* the *Menasche* decision which was handed down on April 4, 1955.[4]

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[2] See section 241(d), 8 USCA 1251(d).

[3] This is the section which the Solicitor General relies upon in asserting that the instant case comes without the savings clause.

[4] The case of *Nevarez* v. *Brownell,* 218 F. 2d 575, which the government erroneously contends is in conflict with the decision below, was decided *before* this Court rendered its decision in *Menasche, supra.* Respondents believe there is no conflict in principle, if there is a conflict at all, between the opinion below and the opinion of the Fifth Circuit Court of Appeals in *Nevarez, supra.* (see Point II of this Brief, *infra*) Further, it is submitted that the Fifth Circuit in *Nevarez, supra,* would undoubtedly have reached a different result had it had the benefit of the guidance laid down by this Court in *Menasche, supra.*

The decision below was not only consistent with its previous ruling in *Bertoldi* v. *McGrath,* 178 F. 2d 997, which was noted by Mr. Justice Clark of this Court in the *Menasche* opinion, *supra,* but it also quotes *only* from the *Menasche* opinion, *supra,* of this Court.

The instant case is even more persuasive than the *Menasche* case, *supra,* from the standpoint of a well established Congressional policy of saving and preserving rights acquired under prior laws rather than destroying them because *Menasche* was an alien seeking to be naturalized. Here we have three claimants to American citizenship. Therefore, since a liberal policy has been properly attributed to Congress by this Court regarding the preservation of rights of aliens under prior laws it certainly is fair to attribute an even greater attitude of leniency by Congress toward American citizens or those who claim it.

II. The opinion below is distinguishable from the opinion of the Fifth Circuit in Nevarez v. Brownell, supra:

The opinion of the Court of Appeals for the Fifth Circuit in *Nevarez* v. *Brownell, supra,* can be distinguished from the instant case on the facts, and by comparing the difference in the issues raised as well as the rationale of the two decisions.

In *Nevarez, supra,* the appellant was not seeking admission to the United States as a citizen like those involved in the instant case. *Nevarez* was resisting deportation on the ground that he was a citizen and had not previously expatriated himself. In addition, *Nevarez,* filed suit *before* the 1952 Act became effective, and then the action abated and was dismissed for his failure to comply with Rule 25(d) of the Federal Rules of Civil Procedure. No such situation occurred in the instant case.

Following a dismissal of the first suit *Nevarez,* started a second suit *after* the 1952 Act became effective and contended that it was a continuation of the first suit which had previously abated and that he, therefore, was entitled to proceed under the savings clause of the 1952 Act. No such situation occurred in the instant case as only one suit was filed, and the argument as to the savings clause in the *Nevarez* case obviously went only to the question as to whether it covered an action previously dismissed. This argument is and was quite different from the instant case where there was no question of abatement of a prior action and where the question was solely whether a right which accrued under the 1940 Act could be maintained after the effective date of the 1952 Act under the language of the savings clause in the 1952 Act.

The Court below in the instant case stated as follows:

> "The question turns upon the savings clause of the 1952 Act." 227 F. 2d 41, 42.

The court below also pointed out that:

> "The general language of this savings clause operates 'unless otherwise specifically provided' in the act." 227 F. 2d 41, 43.

Further, the court below noted that the reference in section 360 of the 1952 Act to exclusion proceedings does not bring the case within the words "unless otherwise specifically provided" of the savings clause. The Court of Appeals for the Fifth Circuit in *Nevarez* cannot be said to disagree because it did not hold that the language contained in section 360 was one of the "exceptions" contemplated by Congress in enacting the savings clause. The Fifth Circuit merely held that section 360 prevented an action for a declaratory judgment under the facts present in that case.

Since the issue was different in *Nevarez* from that present in the instant case below, and since the *Nevarez*

case was decided on the basis of section 360 alone, it is submitted that there is no conflict in principle that is here involved. Actually, the only conflict is in the end result and this must be considered in the light of the different factual situation and issues present in the two cases.

III. The Legislative History of The 1952 Act And The Express Language of The Statute Do Not Support The Government Position:

The Government's petition for a writ of certiorari in this case refers to the legislative history of the 1952 Act and concludes that Congress was dissatisfied with the pattern under section 503 of the 1940 Act and therefore changed the procedure in the 1952 Act as reflected in section 360 of the new law. The inference seems to be that since the 1940 Act was repealed, and since the new Act did not continue former section 503 as it was before, that Congress did not intend the savings clause in the 1952 Act to apply to situations like the instant case. This suggests that Congress did not know what it was doing or know what it said in enacting the savings clause. The government certainly knows better. Moreover, no reference to the legislative history is necessary in this case because the language of the statute itself is clear.

The government also says in its petition at pages 9-10, 15-16, that Congress was concerned with the number of persons who gained entry into the United States under section 503 of the 1940 Act where no such right existed. If this abuse were as bad as the government implies, and if Congress really had intended to do what the government now says it meant to do, namely, cut off all rights to sue for a declaratory judgment under the 1940 Act where the issue arose in exclusion proceedings, then, they could have and would have done so expressly. Ob-

viously, Congress was not as concerned as the Solicitor General would have this Court believe because section 360 could have been specifically exempted from the operation of the savings clause in section 405 (a) just as was done in the deportation and other provisions of the Act. For example, see sections 513 (a), 8 U.S.C.A. 1424 (a); 315 (b), 8 U.S.C.A. 1426 (a); 318, 8 U.S.C.A. 1429. As hereinbefore indicated the Congress intended the 1952 Act to apply *prospectively. United States* v. *Menasche, supra.*

IV. The Instant Case Does Not Merit this Court's Attention Because It Has No Substantial Relation To The Present Administration Of Our Immigration Laws:

The importance of the instant case in terms of the administration of our immigration and nationality laws has been over-stated and grossly exaggerated. In fact, the State Department figures quoted at page 9 of petitioner's brief herein are misleading insofar as any applicability to the instant situation is concerned. For example, certificates of loss of nationality under the 1940 Act were issued for a variety of reasons such as expatriation. Thus, in the absence of a showing of duress, those people who had expatriated themselves would not be able to succeed under the doctrine eunciated by the Court below because expatriation is an affirmative defense to an action for a declaration of citizenship.

Also, four years have passed since 1952 and the alleged 37,518 people referred to on page 9 of petitioner's brief have not flooded our courts yet. Had they been desirous of doing so they certainly would have tried before now. Even if they did it is not for the Solicitor General to say or imply that judicial review in our courts is a practice to be frowned upon or guarded against. At any rate is certainly does not appear from the record of cases similar to the instant one or from the cases similar

to those referred to herein by the government that the problem is presently of great importance to our administrators or the courts in terms of the number of possible litigants.

Aside from the fact that four years have passed since 1952 it can be assumed that many, if not the majority of the 37,518 persons referred to by the government at page 9 of its petition herein were issued their certificates of loss of nationality long before the 1952 Act became effective. These, then, could have exhausted their administrative remedies and filed suit under the 1940 Act long before the 1952 Act came into being. Again, the fact that they did not do so shows that the great majority have long since abandoned the idea.

CONCLUSION

The writ should be denied because this Court in *United States* v. *Menasche, supra,* has already decided the applicable principle here involved. Moreover, the decision below, which came six (6) months *after Menasche,* supra, is clearly correct in its application of the principles and philosophy laid down by this Court in *Menasche, supra.* Furthermore, there is no real conflict between the opinion below and that of the Fifth Circuit in *Nevarez* v. *Brownell, supra,* which, in any event, was decided *prior* to this Court's decision in the *Menasche* case. Finally, the effect of the decision below upon the administration of our Immigration laws has been grossly exaggerated by the Government.

Respectfully submitted,

CHARLES R. RICHEY
1025 Connecticut Avenue, N.W.
Suite 210
Washington 6, D.C.
Attorney for Respondent